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To: Department Planning
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Subject: CUP 20-14

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Dear Commissioners,

1. The subject structure does not and cannot as a matter of law constitute a mobile home. HCC 21.03.040 (not HCC 21.030 as cited in Staff Report 20-58) defines mobile home in significant part as a structure that is **built on a permanent chassis and is designed for use as a dwelling.** The subject Connex was not built on a permanent chassis and was not designed for use as a dwelling. A "chassis" is the base frame of a motor vehicle or other wheeled conveyance. A Connex shipping container is designed to be transported on a trailer towed by a truck and therefore has no permanent chassis. (The truck has a permanent chassis and the trailer has a permanent chassis but the Connex shipping container does not). HCC 21.03.040 states in part as follows: "A mobile home shall be construed to remain a mobile home whether or not wheels, axles, hitch or other appurtenances are removed, and regardless of the nature of the foundation provided." It would follow that a Connex shipping container shall be construed to remain a shipping container whether or not it is modified into a dwelling unit. According to the Manufactured Housing Institute's National Communities Council (MHINCC), manufactured homes are homes built entirely in the factory under a federal building code administered by the U.S. Department of Housing and Urban Development (HUD). The MHINCC distinguishes among several types of factory-built housing: manufactured homes, modular homes, panelized homes, pre-cut homes, and mobile homes. Shipping containers are not designed or manufactured to comply with a nationally recognized model building code for site-built housing and the MHINCC does not consider modified shipping containers to be factory-built housing of any sort. Neither does HCC. Shipping containers are considered a nuisance and prohibited in the CBD. (HCC 21.18.080(c)). Modifying a shipping container does not magically transform it into something else. No matter how much lipstick one puts on a pig, at the end of the day it is still a pig. The fact that the subject structure may no longer be functional as a shipping container is irrelevant. It belongs in the dump, not in the CBD.

2. At page 3 of Staff Report 20-58 it states "Both homes would use the eastern **driveway.**" But HCC 21.54.080 mandates that "each mobile home space shall be directly accessible by a vehicle from an internal street without the necessity of crossing any other space. **Direct vehicular access from public streets to a mobile home space is prohibited.**" HCC 21.03.040 defines street as follows: "Street" means a public thoroughfare including a public street, road or highway of any description that affords a principal means of access to abutting property. **Street does not include alley or driveway.**" (Emphasis added). Furthermore, HCC 21.54.090 states: "The internal street system of a mobile home park shall provide convenient circulation by means of minor streets and collector streets. Dead-end streets shall be provided with an adequate turning circle at least 80 feet in diameter." The proposed mobile home park contains no minor streets or collector streets and therefore cannot be sustained. Applicants recently removed chain link fencing to install a new driveway providing direct vehicular access from Bonanza Avenue to the Connex. This new driveway did not exist prior to the illegal installation of the Connex. There is no evidence in the record that a

driveway permit was issued for the construction of the new driveway and it seems unlikely that it will now be abandoned. The driveway to the east provides direct vehicular access from Bonanza Avenue to the other structure on the subject lot. This direct access from Bonanza to the existing structure would be prohibited in a mobile home park under the provisions of HCC 21.54.080 cited above. There is no evidence in the record that a prerequisite driveway permit was issued for that driveway either.

3. Most building contractors quickly learn that forgiveness is easier to obtain than permission. California *contractor* Scott Lowry and his wife had the Connex placed on the subject lot before obtaining prerequisite zoning permits thereby violating HCC 21.90.090(a)(3), HCC 21.90.090(a)(6), and HCC 21.90.090(a)(7). The applicants are therefore zoning code violators per HCC 21.90.090(c). Every day upon which the act or condition occurs constitutes a separate violation. (HCC 21.90.090(b)). Violators are subject to a fine of not less than \$75 and not more than \$300 for each violation. (HCC 21.90.100). The Applicants would never get away with such flagrant zoning violations in Ojai California; its Planning Department would likely order the immediate removal of the subject structure and/or initiate other measures to enforce its zoning code.

4. The proposed structure is incompatible with the purpose of the CBD. The primary purpose of the CBD is to provide a centrally located area within the City for general retail shopping, personal and professional services, educational institutions, entertainment establishments, restaurants and other listed business uses. The primary purpose of the CBD is not to provide mobile home parks for modified Connex dwellings. The proposed structure would create conflict with nearby non-residential uses including Glacierview Garage located at 519 Klondike Avenue which I have owned and operated for over 40 years. The design of the modified Connex is not pedestrian-friendly. One has to wonder how horrible and/or illegal a CUP proposal would have to be for Planning Staff to recommend its denial.

5. The value of adjoining property will likely be negatively affected greater than that anticipated from other permitted or conditionally **permitted** (vs. **permissible**) uses in the CBD. HCC 21.71.030 mandates that the applicant "must produce evidence sufficient to enable meaningful review of the application." Thus, the applicants have the burden to prove that their proposal will not negatively affect adjoining property values greater than that anticipated ... etc. Applicants have not and likely cannot meet this burden. The review criteria prescribed under HCC 21.71.030(c) is excessively ambiguous, totally subjective, and requires the applicant to prove a negative fact. As recently argued by counsel for the City of Homer, the law rarely requires a party to prove a negative fact. *Hewing v. Alaska Workmen's Compensation Bd*, 512 P.2d 896, 900 n.14 (Alaska 1973). HCC 21.18.030(f) lists railroads as a **permissible** conditional use in the CBD. Even though no CUP application for railroad has ever been applied for or approved in the CBD, is this extremely low bar one of the standards for judging whether a different proposal will negatively affect the value of adjoining property? Or is the standard a use that has already been conditionally **permitted** and currently exists? Can it exist anywhere in the CBD or must it exist in the surrounding neighborhood of the proposed CUP? If a proposed use or structure must simply be less deleterious to adjoining property values than that anticipated from a freight train then the Commission's consideration of HCC 21.71.030(c) is pointless. HCC 21.18.010 mandates that conflicts between residential uses and nonresidential uses are to be resolved in favor of nonresidential uses so the fact that a drinking establishment could adversely affect the value of adjoining residential land is moot because owners of residential CBD properties apparently forfeit all of their constitutional property rights to the owners of nonresidential properties.

6. The proposal is not compatible with uses of surrounding land. None of the **surrounding land** (undefined) contains modified Connex dwellings or mobile home parks. HCC 21.71.020(a)(6) required Applicants to provide a map showing **neighboring lots** (undefined) and a narrative description of the existing uses those neighboring lots but they failed to do so. "Neighboring lots" is not synonymous with "abutting lots" and would arguably include all properties located within 300 feet of the subject property since the Notice of Public Hearing was sent to all (neighboring) property owners within 300 feet. The Commission should not consider this application until HCC 21.71.020(a)(6) is fully complied with. HCC 21.71.020(a)(3) required Applicants to provide the legal description of the subject lot but they did not. The Homer City Clerk rejected my initial Notice of Appeal re: CUP 14-05 because I neglected to include therein the formal legal description of the subject property in addition to its street address and KPB parcel number which were included.

7. Existing fire services may not be adequate to extinguish a meth lab fire in a modified shipping container dwelling. No input from HVFD was sought or received.

8. The fact that mobile homes and mobile home parks are listed as permitted uses and conditionally permitted uses respectively in the CBD is irrelevant since the proposed use is not a mobile home. Being compatible with the purpose of the CBD is a distinct review criteria and compatibility with the purpose of the CBD does not guarantee that the proposal will not cause undue harmful effect upon desirable neighborhood character. If the modified Connex is rented to drug dealers this would clearly cause undue harmful effect upon desirable neighborhood character. Applicants assert that the proposed dwelling is to be used "as a guest house to stay in when we visit and have family members stay while in town" but this would not be binding on Applicants or future owners unless a condition were imposed that the alleged "guest house" not become a rental or put to some other more objectionable use. Note that the Applicants and visiting family members could stay in the existing mobile home instead of in the cramped and unsightly Connex which seems better suited to drug dealers and miscreants. A mild earthquake could easily topple the existing fuel oil tank (conveniently omitted from the Applicants' fanciful conceptual drawing) spilling hundreds of gallons of fuel oil onto the adjacent property. No Commissioner or Planning Department employee would likely support the approval of CUP 20-14 if they lived next door to the subject Connex.

9. Staff's analysis pertaining to HCC 21.71.030(g) fails to address whether the proposal will be unduly detrimental to the health, safety or welfare of the surrounding area or the city as a whole. The fact that city utilities, police, fire and road maintenance services are available and adequately serve the lot may apply to HCC 21.71.030(f) but is irrelevant to HCC 21.71.030(g). HCC 21.71.030(g) is one of the review criteria that must be met before the CUP 20-14 can be approved. Staff circuitously asserts that if all applicable standards required by code are met, including this one, then this review criteria will be met. Such a finding is evasive and inadequate. If Connex shipping containers were not considered nuisances and unduly detrimental to the health, safety and/or welfare of the surrounding area they would not be prohibited in the CBD under HCC 21.18.080(c).

10. The proposal cannot comply with the applicable regulations and conditions specified in the zoning code unless the subject structure is first removed. HCC 21.70.010(a)(1) mandates that a zoning permit shall be obtained from the City Planner for the erection, construction or moving of any building or structure. HCC 21.70.010(b) states: "The zoning permit required by this section shall be obtained **prior to the commencement of any activity for which the permit is required**. Failure to do so is a violation." There is no provision in HCC for issuing after-the fact zoning permits. HCC 21.70.070 states as follows: "Nothing in this chapter shall relieve the applicant of the obligation to obtain a conditional use permit, sign permit, variance, or

other permit or approval required by other provisions of the zoning code. The zoning permit required by this chapter shall be in addition to any other applicable permit or approval requirements. If any such additional permits or approvals are required, they must be obtained **prior** to the issuance of the zoning permit under this chapter. Thus, CUP 20-14 would need to be approved before the issuance of a zoning permit and the structure would have to be removed before that zoning permit could be issued. HCC 21.70.030(c) provides that in granting a zoning permit, no City official or employee has authority to grant a waiver, variance, or deviation from the requirements of the zoning code and other applicable laws and regulations, unless such authority is expressly contained therein. There is no evidence in the record that either driveway permit has been acquired or that the CUP application fee has been paid.

11. The proposal is contrary to many applicable land use goals and objectives of the Homer Comprehensive Plan. Applicants failed to meet their burden of proof that their proposal is not contrary to the applicable goals and objectives of the Comprehensive Plan (once again Applicants were unreasonably required by city code to prove a negative) and Planning Staff ignored several applicable provisions of the Comprehensive Plan with which the proposal clearly does not comport while creatively presenting others in a favorable light. As pointed out on page 1 of Staff Report 20-58, Goal 1, Objective C is to maintain high quality residential neighborhoods. Allowing a Connex shipping container to be occupied as a dwelling unit in the CBD is clearly contrary to the goal of maintaining high quality residential neighborhoods and potentially sets a precedent would generate an influx of additional substandard housing in the CBD. The overly-broad goal of promoting infill development in all housing districts is not a legitimate zoning objective because it would support any and all development thus defeating the purpose for adopting a comprehensive development plan in the first place. "Not all of the goals articulated by the City can be considered legitimate per se. For example, any zoning change which eases restrictions on property use could be said to further the goal of "filling in vacant places." *Griswold v. City of Homer*, 925 P.2d 1015, 1023 n. 9 (Alaska 1996). In any event, the subject lot is already infilled with a single-family dwelling. Furthermore, it is not clear that the Central Business District constitutes a "housing district" which is undefined in HCC 21.03.040. Planning Staff's finding that the proposed structure may at some point "be closer to meeting the intent of the Comprehensive Plan" is not only damnation by faint praise but inadequate to support the prerequisite review criteria i.e., not being contrary to the Comprehensive Plan's applicable land use goals and objectives. Planning Staff's finding that "no evidence has been found that it is **not** contrary to the applicable land use goals and objects [sic] of the Comprehensive Plan," while very true and therefore automatic grounds for denial of the application for CUP 20-14, appears to be a Freudian slip. The photos of the subject Connex that are included in the Commission's packet constitute substantial evidence that the proposal is contrary to the applicable goals and objectives of the Comprehensive Plan. The proposed development is flagrantly contrary to many Chapter 4 land use goals and objectives including protecting community character, maintaining high quality residential neighborhoods, maintaining the quality of Homer's natural environment and scenic beauty, and encouragement of high quality buildings and site development that complement Homer's beautiful natural setting. No matter how much lipstick is applied to it, a Connex shipping container does not constitute a high quality building. Even if no evidence had been found by Planning Staff that the proposal is contrary to the applicable goals and objectives of the Comprehensive Plan, that would not constitute evidence that the proposal is not contrary to the applicable goals and objectives of the Comprehensive Plan. Quasi-judicial findings must be based on substantial evidence and a lack of evidence does not constitute evidence of any kind. (Ask your attorney).

12. Finding #10 of Staff Report 20-58 states that the project will comply with the applicable provisions of the Community Design Manual but erroneously suggests that only the outdoor lighting section of the CDM applies to the application for CUP 20-14. Applicants erroneously state that their project does not trigger a Community Design Review CDM review. Accordingly, they did not complete the design review application form. Downward lighting is required by HCC 21.59.030 but no outdoor lighting plan was submitted by the

Applicants. Because this is an application for CUP, all applicable provisions of the CDM apply, even those provisions that would not otherwise apply. If this were not the case, HCC 21.71.030(j) would be superfluous. The Commission should make a finding of law as to whether other provisions of the CDM (besides outdoor downward lighting) are applicable to the application for CUP 20-14 and therefore prerequisite for its approval. To this end, it would be prudent for the Commission to seek legal advice from an unbiased attorney not affiliated with or influenced by the Planning Department or Administration. That attorney could also advise the Commission whether a modified Connex can constitute a mobile home. Neither Planning Staff nor the Administration has the authority to deny independent legal representation to the Commission if it is requested.

13. Black's Law Dictionary defines testimony as follows: "Evidence given by a competent witness under oath or affirmation; as distinguished from evidence derived from writings, and other sources. Testimony is particular kind of evidence that comes to tribunal through live witnesses speaking under oath of affirmation in presence of tribunal, judicial or quasi-judicial." Thus, those testifying before the quasi-judicial Commission, including the Applicants, should first be sworn in.

14. HCC 21.71.010(c) states that nothing in the zoning code shall be construed to require the granting of a conditional use permit. Staff Report 20-58 was prepared before critical evidence was presented. The Commission should reject the biased, unsubstantiated, circuitous off-point, conclusionary, and blatantly erroneous findings of Staff Report 20-58, except for the Freudian slip, and deny the application for CUP 20-14. In accordance with HCC 21.71.050(b), the Commission has 45 days to issue its Decision and Findings and, within that 45-day period, may deliberate in executive session, with or without legal representation, as many times as it deems necessary. The City Planner is not a member of the Homer Advisory Planning Commission and therefore has no authority to attend the executive sessions or sign the *Commission's* Decision.

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